

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

01/18/2002

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2001-000442

FILED: _____

STATE OF ARIZONA

F TYLER RICH

v.

FLOYD R BLEAK

RICHARD T LYNCH

PHX CITY MUNICIPAL COURT
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #8954318

Charge: SOLICITATION OF PROSTITUTION

DOB: 11/22/33

DOC: 12/06/00

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

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This matter has been under advisement since the time of Oral Argument on December 19, 2001. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. The court has considered the Memoranda by counsel and the Transcript of Proceedings, CD No. 7055292001, from the Phoenix City Court.

Appellant was charged with solicitation of another person to commit an act of prostitution, a Class 1 misdemeanor, in violation of Phoenix City Code Sec. 23-52(a)(2). The act was alleged to have occurred December 6, 2000. Appellant entered a plea of not guilty and the case was tried to a jury before the Honorable George Logan in the Phoenix Municipal Court. The jury found Appellant guilty of the charge.

1. Assignments of Error.

This court considers Appellant's citation of three assignments of error:¹

- (a) The court abused its discretion in denying Appellant's motion for a mistrial after the prosecutor told the jury that Appellant's explanation for his conversation with the undercover officer was contrived after discussing it with his lawyer;
- (b) That the court erred in denying a mistrial because of the prosecutor's misstatement of the law regarding the specific intent element of the criminal charge; and
- (c) That the court abused its discretion when it allowed the prosecutor, over an objection, to elicit alleged speculative testimony from the Appellant about what a non-present expert witness would testify about Appellant's medical condition.

¹ Appellant's Memo., p. 2.
Docket Code 512

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2. Standard of Review.

Appellant raises issues of constitutional dimension; therefore this court considers the appeal from a Constitutional standpoint. While Appellant does not precisely claim denial of his Constitutionally protected rights, he nevertheless alleges a violation of due process² - itself a Constitutionally protected right³ - and contends the error represents prejudice sufficient for reversal. Since Appellant's claim involves an allegation of a Constitutional violation, this court reviews the case *de novo*.⁴ However, this court must defer to the trial court's factual findings that form the basis for its legal rulings.⁵ If any error does, in fact, rise to Constitutional proportions, it should be reviewed under the harmless beyond a reasonable doubt standard.⁶

The record readily reveals a high level of unprofessional, hostile exchanges between the Prosecutor and Defense counsel at trial. Such departures from decorum can lead to mistakes warranting mistrial and cannot be condoned. I observe that it is the trial court's responsibility to admonish counsel about engaging in unwarranted, personal attacks on opposing counsel.

3. Prosecutorial Misconduct and Prejudicial Error.

Appellant objects to several alleged errors and instances of prosecutorial misconduct. Discussion of Appellant's argument follows the three-step analysis outlined in United States v. Roberts⁷:

² Id. at 6.

³ Ariz. Const. art. 2 § 4.

⁴ State v. Gonzalez-Gutierrez, 187 Ariz. 116, 927 P.2d 776 (1996); Ramirez v. Health Partners of Southern Arizona, 193 Ariz. 325, 972 P.2d 658 (App. 1998).

⁵ State v. Gonzalez-Gutierrez, *supra*.

⁶ United States v. Rivera, 900 F.2d 1462, 1470 n.6 (10th Cir. 1990).

⁷ 618 F.2d 530 (9th Cir. 1980).

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(1) Did any error or prosecutorial misconduct occur; (2) Were the issues preserved for appeal; (3) Was the defendant prejudiced?

a. The Prosecutor's questions and argument were not improper.

The Arizona Supreme Court has ruled that trial attorneys have wide latitude in presenting closing arguments.⁸ Furthermore, counsel are permitted to comment on the evidence and argue all reasonable inferences.⁹ Here, it seems the Prosecutor's inquiry relative to Appellant's testimony about AIDS did not rise to the level of misconduct. During cross-examination, she justifiably asked, "Did you ever mention AIDS at all to this officer?"¹⁰ Appellant testified he mentioned AIDS to Officer Keltgen, "At the end? Yes. At the end of it."¹¹ Understandably indicating disbelief, she came back with, "Did you?" At this point, Appellant waffled some saying, "I told her about my - well, wait a minute."¹²

During closing argument, the Prosecutor- apparently drawing a reasonable inference - said,

The defense attorney's mentioning that the defendant had a curiosity about AIDS only occurred after, and significantly after this. Because you don't hear [Officer Keltgen] mentioning in any way, shape or form AIDS. [The Appellant] didn't discuss AIDS with the person whom he felt was a prostitute. He

⁸ State v. Herrera, 174 Ariz. 387, 396, 850 P.2d 100 (1993); State v. Blazak, 114 Ariz. 199, 204, 560 P.2d 54, 59 (1977); State v. Gonzales, 105 Ariz. 434, 436-37, 466 P.2d 388, 390-91 (1970).

⁹ State v. Hill, 174 Ariz. 313, 848 P.2d 1375 (1993); State v. Dumaine, 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989); State v. Zaragoza, 135 Ariz. 63, 68, 659 P.2d 22, 27, cert. denied, 462 U.S. 1124, 103 S.Ct. 3097, 77 L.Ed.2d 1356 (1983).

¹⁰ RT, p. 25, l. 23.

¹¹ RT, p. 25, l. 24.

¹² RT, p. 26, l. 1.

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didn't discuss AIDS with the other officers who responded to the scene. So he didn't demonstrate in any way that he had any kind of fascination with AIDS until perhaps he discussed it with his defense.¹³

Given Appellant's testimony, the Prosecutor's inferences about Appellant's contriving an AIDS defense was reasonable. Appellant's interest in AIDS was not corroborated by other testimony.¹⁴ The trial court properly found that the remarks did not warrant a mistrial and denied Appellant's motion.¹⁵

It is an established principle that the prosecutor should not misstate the law in closing argument.¹⁶ In this instance, however, as explained,¹⁷ the record indicates that defense counsel objected before the Prosecutor could finish her statement.¹⁸ Still, what she had said was technically correct - that ". . . the code, Phoenix City code that deals with prostitution does not have an element intent."¹⁹ And, judging by the record,²⁰ she very well could have intended to add that case law had supplemented the criminal statute with a *mens rea* element. However, she was not given the opportunity. Given the interruption by defense counsel, this Court concludes that the prosecutor did not misstate the law.

(b) The issues were not preserved for appeal.

Though Appellant did object, he did not request a curative jury instruction from the court.

¹³ RT, p. 54, l. 19 through p. 55, l. 2.

¹⁴ RT, p. 61, l. 16 through p.62, l. 1.

¹⁵ RT p. 62, l. 18 through p.63, l. 2.

¹⁶ United States v. Berry, 627 F.2d 193 (9th Cir. 1980), *cert. denied*, 449 U.S. 1113, 66 L. Ed. 2d 843, 101 S. Ct. 925 (1981); State v. Tims, 693 P.2d 333, 143 Ariz. 196.

¹⁷ RT p. 49, ll. 6-7.

¹⁸ RT p. 48, l. 7 through p. 49, l. 7.

¹⁹ RT, p. 48, l. 7-8.

²⁰ RT, p. 48, l. 9 through p. 49, l. 7.

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(c) Appellant was not prejudiced by the questions posed by the Prosecutor.

The Appellant was not prejudiced. The statement about fabricating a defense after consulting with an attorney and the prosecutor's misstatement of the specific intent element of the criminal law were not improper. Although he objected, the defense attorney requested no curative instructions of the court. The court did not abuse its discretion in denying Appellant's motion for a mistrial.

4. Speculation About Expert Testimony.

Traditionally, only verifiable expert witnesses were recognized under the law as a source of opinion testimony. According to current practice, however, lay opinions will be allowed if they have value to the fact-finder, though they must be "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue."²¹

The Prosecutor asked the Appellant what he thought the non-present expert would say, "Okay. So, even if we were to have that physician that you saw from CIGNA come in and share information, even that physician wouldn't tell us that [you] were impotent, right?"²² The Appellant, as the jury might well expect, simply said "I don't know."²³ Thus no hearsay expert opinion was admitted. This Court finds no error.

5. Conclusion.

Having considered this appeal on Constitutional and procedural grounds, this court holds that Appellant was not denied his Constitutional right to due process.

²¹ Rule 701, Arizona Rules of Evidence.

²² RT, p. 33, ll. 6-8.

²³ RT, p. 33, l. 24.

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For all of the reasons explained in this opinion, this court concludes that the trial court did not err in denying Appellant's Motion for Mistrial.

IT IS ORDERED affirming the judgment of guilt and sentence imposed by the Phoenix City Court.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for any and all further proceedings.